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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 198

HELEN PRATT STUFF,

Petitioner,

against

E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF FACTS	3
THE DECISIONS BELOW	9
REASONS FOR NOT ALLOWING THE WRIT	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

B. & B. Auto Supply Inc. v. Plesser, 133 U. S. P. Q. 247 (S. D. N. Y. 1962)	12
Falk v. Gast. Lith. & Eng. Co., 40 F. 168 (C. C. S. D. N. Y. 1889)	11
Forster Music Publisher, Inc. v. Fred Fisher Music Co., Inc., 63 U. S. P. Q. 112 (S. D. N. Y. 1944)	11
Hampton v. Paramount Pictures Corporation, 279 F. 2d 100	3
Harms Inc. v. Pure Milk Ass'n, 37 U. S. P. Q. 575 (N. D. Ill. 1938)	11
Kraft v. Cohen, 117 F. 2d 579 (C. A. 3rd 1941)	11

PAGE

Peter Pan Fabrics Inc. v. Acadia Co., 173 F. Supp. 292 (S. D. N. Y. 1959) 12

Scarves by Vera Inc. v. United Merchants and Mfrs., Inc., 173 F. Supp. 625 (S. D. N. Y. 1959) 12
Stuff v. E. C. Publications, Inc. *et al.*, 342 F. 2d 143 (2 Cir. 1965) 10
Stuff v. LaBudde Feed & Grain Co., 42 F. Supp. 493 7–8

Statutes:

Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, *et seq.*, U. S. C. Title 17), §§1 (a), 10 and 24 3
28 U. S. C. 1254 (1) 2

Other Authorities:

Amdur, Copyright Law & Practice 1066 (1936) 11
Nimmer on Copyright, §139.2 ..... 11, 12

IN THE

Supreme Court of the United States

October Term, 1964

No. 1225

HELEN PRATT STUFF,

Petitioner,

against

E. C. PUBLICATIONS, INC., WILLIAM M. GAINES, INDEPENDENT NEWS CO., CROWN PUBLISHERS, INC. and BALLANTINE BOOKS, INC.,

Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The memorandum opinion of the District Court for the Southern District of New York, dated September 19, 1962, is not officially reported but is printed as Appendix A to the petition herein.

The opinion of the Court of Appeals for the Second Circuit, dated March 2, 1965, is officially reported at 342 F. 2d 143 and is printed as Appendix C. to the petition herein.

Jurisdiction

The judgment of the Court of Appeals was entered on March 2, 1965. The petition for writ of certiorari was filed on May 29, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether an infringement of copyright can be found where the copyright holder has failed to introduce any evidence that authorized copies of the work bore the required copyright notice or that any precautions were taken to inscribe such notices.

2. Whether an infringement can be found in the face of the trial court's holding (literally affirmed by the Court of Appeals) that the evidentiary facts in the record warranted the conclusion that the copyright owner had authorized or acquiesced in the widespread publication of the work by others.

Petitioner has described the question for review as being merely whether "dedication" to the public of a copyrighted work can be predicated upon the dereliction of the owner in preventing others from infringing it (Pet. p. 3). This limited characterization of the issue is inaccurate. Concepts of "dedication" or "abandonment" aside, the fact is that the trial court held on the basis of all the facts before it, that the copyright proprietor had "authorized" or "acquiesced" in the wide circulation of the work by

others, which ruling has been endorsed by the Court of Appeals. Thus, there is no apparent conflict between the Second and Ninth Circuits as petitioner suggests. To be sure, the Ninth Circuit decision in *Hampton* v. *Paramount Pictures Corporation,* 279 F. 2d 100, indicates that "abandonment" of the rights granted under the Copyright Law must be manifested by some overt act. But the opinion of the trial court here refers to "authorization" or "acquiescence" by the copyright owner—not naked "abandonment" (App. 189, 191)—and the affirming opinion of the Second Circuit Court of Appeals expressly states that its holding is based upon adequate proof below of that "acquiescence" (App. C to Pet., p. 22). The term "abandonment" is nowhere employed in the opinions of either the District or Appeals Courts in this case.

Statute Involved

The pertinent provisions of the Copyright Act of March 4, 1909, c. 320 (35 Stat. 1075, *et seq.*, U. S. C. Title 17) are §§1(a), 10 and 24 as set out in the petition herein (pp. 4, 5).

Statement of Facts

Respondents are the publishers and distributors of a satirical humorous magazine entitled "Mad" and various hard and soft-covered reprints thereof (Defts.' Exhs. K-1, 2, 3, 4, 5, 6; L-1 through L-17). Sometime prior to December, 1954, a post-card bearing the face of a moronic boy with the legend "What—Me Worry?" imprinted beneath was received from an anonymous source by the editorial

staff of "Mad". Said card bore no copyright notice (191a).* A photostat was made of it (Defts.' Exhs. M-1 and M-2) and it was reproduced once on the cover of the December, 1954 issue of the magazine (84a). For about three years prior to the commencement of this action, versions of the boy's face, derived from the aforesaid postcard (Defts.' Exhs. M-1, M-2), enhanced by color and various physiognomical detail supplied by "Mad's" artists, appeared on the cover of each issue of the magazine (85a, 86a, 89a, 92a, 119a).

Long before the inception of this action "Mad's" editors attempted to trace the origin of the face on the postcard that they had adopted as a "mascot". They inserted an item in the magazine inviting the aid of its readers in this quest (86a) and received an abundance of replies, generally of a facetious nature, as well as scores of photographs, prints and pictures of the same or very similar figures, none of which bore copyright notices of petitioner or her predecessor. Some of these pictures were reproduced in the magazine along with portions of the readers' letters (Defts.' Exhs. K-4, 5, 6).

In January, 1958, petitioner's New Jersey attorney wrote to respondents' counsel claiming copyright infringement (Pltff.'s Exh. 8). Respondents' attorney sought a copy of the work from the Copyright Office but was informed that the copies of the print originally deposited had been returned to the registrant a few weeks after they had been filed in 1914 (Defts.' Exh. O). Respondents sub-

* This and subsequent similar references are to Petitioner's (Appellant's) Appendix.

sequently received a further claim letter from petitioner's New York lawyers (Defts.' Exh. O). Upon demand of respondents' counsel, they furnished him with a copy of petitioner's print which bore no copyright notice (Defts.' Exhs. P-1, P-2). When the instant action was commenced, the complaint served did not have a copy of petitioner's print annexed (4a-9a; 95a). Shortly after this suit was begun, respondents were sued in the District Court for the Southern District of New York by one William A. Schmeck, who claimed a 1936 copyright on a print identical with petitioner's (Defts.' Exh. B; 95a). Almost simultaneously, respondents received claim letters and documents from one Ben Brotman who submitted data indicating that in 1950 he had obtained United States and Canadian copyrights on a print that was also an exact replica of petitioner's (Defts.' Exh. C). During the same period respondents were threatened with an infringement suit by one Harry Keir who possessed a copyright somewhat similar to petitioner's (Defts.' Exh. D).

Bewildered and amazed by the multiple infringement claims arising from their use of the boy's face involved in this action, respondents employed a researcher of old prints to trace the origin of the work in question (102a). He provided respondents with certain material indicating that a figure of a large-eared, gap-toothed, grinning boy, similar to petitioner's print, had made its public appearance years before petitioner's copyright. The researcher's efforts, supplemented by respondents', are reflected in a collection of material received in evidence in support of respondents' claim that petitioner's copyright lacked originality (Defts.' Exh. A).

During the past few decades, pictures either identical with, or very similar to, petitioner's print have been widely circulated throughout the United States by individuals and firms for a large variety of commercial purposes, none of which bears petitioner's copyright notice. Some of these carry evidences of purported copyright by third persons (Defts.' Exh. E); many, many more are without copyright legend of any kind (Defts.' Exh. H). Identical copies of petitioner's print without copyright notice appear framed under glass (Defts.' Exh. F) and scattered through the text of a book entitled "Hall of Fame", published in 1943 (Defts.' Exh. G). A bust reminiscent of the face on petitioner's copyrighted print and a doll equally similar in appearance were also received in evidence as further examples of the universal use that has been made of the property claimed by petitioner to be hers exclusively (Defts.' Exhs. I, J).

Petitioner married the copyright registrant in 1927. From that date until at least the time of her examination before trial in 1959, neither she nor her husband had caused any copies of the print to be published or sold nor had he or she licensed anyone else to engage in such activities (150a, 159a). From 1938 when her husband died, until her said examination before trial, petitioner did not derive any income from the printing or sale of copies of the print nor did she license any other parties to exploit the property in any manner (159a). Indeed, petitioner acknowledged that from the time of her marriage in 1927 to the time of her husband's death in 1938, she knew of no business activity of any kind relating to the copyright that had been conducted by her husband at any time (161a). The total

commercial exploitation of the copyrighted print was limited to a handful of transactions between 1914 and 1920 which involved the aggregate sale of some 2,000 copies of the work (Pltff.'s Exhs. 12-f–12-s).

Two ancient photographs of apparent early twentieth century vintage were introduced into evidence by petitioner, both of which consisted of store windows containing displays of prints portraying the boy appearing on petitioner's work. One of these (Pltff.'s Exh. 1-E) clearly depicts the legend "Me Worry" inscribed beneath the figure of the boy and above this designation there appears a thin line of type which evidently consists of a copyright notice. The other, and apparently older photograph (Pltff.'s Exh. 1-D), likewise reveals the inscription "Me Worry" beneath the figure, but even with the use of a magnifying lens employed at the trial, no trace of any copyright notice was discernible (98a-99a).

Petitioner did not at any time claim or attempt to prove at the trial that any of the respondents was aware of the existence of her copyright prior to the institution of the suit, and the denial by respondent Gaines of any such knowledge stands uncontroverted (100a).

Petitioner's copyright, originally issued to her husband in 1914, was renewed by her in 1941. From 1941 through 1948 she collected the aggregate sum of $2,850 from the settlement of six separate claims of infringement (158a). None of these settlements was the result of any court judgment or adjudication of the validity of the copyright (43a). In one action brought by her (*Stuff* v. *LaBudde Feed &*

Grain Co., 42 F. Supp. 493) defendant's motion to dismiss the complaint for non-joinder of parties and on the ground that the work was not copyrightable was denied without adjudication or determination of any issues on the merits (44a). The case was thereafter settled for $900 (156a), which amount is included in the gross collections by petitioner of the aforesaid sum of $2,850 through settlement of unlitigated claims of infringement.

Petitioner offered no evidence at the trial to establish that all authorized copies of the print had borne the requisite copyright notice or that any precautions had been taken in that direction so as to comply with the requirements of the Copyright statute. Indeed, such evidence as was introduced by the petitioner herself tended to negate such compliance, for the old photograph of the store window (Pltff.'s Exh. 1-D) contained numerous copies of the print which revealed no copyright notices thereon, even with the aid of a magnifying glass. Moreover, the scores of copies of the print produced at the trial by respondents, bearing copyright notices by many different persons, or none at all, confirmed that petitioner's print had probably been published without proper notice or had been published before the copyright had been secured (Defts.' Exhs. B, C, D, E, F, G, H).

The Decisions Below

The District Court's memorandum decision clearly states that the judgment for the respondents was based upon petitioner's utter failure to prove that authorized copies of the print had borne the requisite copyright notice. The Court stated, further, that such evidence as was in the record contrarily indicated that the existence of so many prints without the required notice for so long a time was the probable product of the copyright owner's authorization or acquiescence. Thus, the Court declared (Pet. p. 18):

> "The plaintiff has the burden to show that all copies published by her deceased husband, or under his authority, bore the required copyright notice. *Forster Music Publisher, Inc.* v. *Fred Fisher Music Co., Inc.*, 63 U.S.P.Q. 112 (S.D.N.Y. 1944).
>
> "Although plaintiff need not present direct proof that each authorized copy contained the notice, she must introduce general proof of the precautions that were taken to inscribe the notices. See *Falk* v. *Gast. Lith. & Eng. Co.*, 40 F. 168 (C.C.S.D.N.Y. 1889) and Amdur, *Copyright Law & Practice* 1066 (1936). Plaintiff has introduced no such evidence. On the contrary, the very existence of such a volume of nearly identical prints without the required notice over so long a period suggests either that the copyright owner authorized or acquiesced in their wide circulation. Since plaintiff has failed to prove this essential element of her case, judgment must be awarded to the (256) defendants."

The opinion of the Court of Appeals expresses its affirmance of the District Court's determination, as follows (Pet. p. 22):

> "On this record we must hold that the defendants have met their burden of showing circulation of copies without notice, acquiesced in by the copyright holder."

A reading of both opinions below clearly indicates that the Court of Appeals differed with the District Court only to the extent that it questioned, without ultimately deciding, whether the petitioner or respondents had the burden of proof on the question relating to the circulation of copies of the print without copyright notice. The Court of Appeals affirmed because it determined that, regardless of whose burden it was, the respondents had shouldered and carried it successfully.

It is noteworthy that the District Court's memorandum does not speak of "abandonment" or "dedication" and the Court of Appeals does not employ the term "abandonment" in its opinion. The last sentence of the Appeals Court's opinion utilizes the word "dedicated", but obviously only for the purpose of characterizing the effect of petitioner's "acquiescence" already determined to have been proven by the evidence.

Respondents filed a cross-appeal from a number of adverse rulings of the District Court despite its holding in their favor (196a). The Court of Appeals expressly stated that it was not considering the questions raised on said cross-appeal, declaring (Pet. p. 21):

> "* * * the facts found make it clear that relief was properly denied, and we affirm the judgment. It is therefore unnecessary to consider defendants' cross-appeal attacking certain of the court's findings."

Under the circumstances, the granting of the writ sought by petitioner herein and this Court's subsequent review would not finally dispose of this case even if petitioner's contentions were given judicial recognition and approval.

Reasons for Not Allowing the Writ

1. The decision below was based upon extensive findings of fact by the trial court. The quality and quantity of those findings of fact were approvingly cited by the Appeals Court to justify its affirmance. It is not the function of this Court to review cases that have been decided on the basis of the impact of factual evidence.

2. There are no unique or unusual questions presented. The principle relied on by the District Court requiring petitioner to prove that authorized copies of the print bore copyright notice is fundamental. *Falk* v. *Gast. Lith. & Eng. Co.*, 40 F. 168 (C. C. S. D. N. Y. 1889); *Forster Music Publisher, Inc.* v. *Fred Fisher Music Co., Inc.*, 63 U. S. P. Q. 112 (S. D. N. Y. 1944); *Kraft* v. *Cohen*, 117 F. 2d 579 (C. A. 3rd 1941); *Harms Inc.* v. *Pure Milk Ass'n*, 37 U. S. P. Q. 575 (N. D. Ill. 1938); Amdur, *Copyright Law & Practice* 1066 (1936); *Nimmer on Copyright*, §139.2. And even if the burden of proving circulation of copies of the print without notice was on the respondents, that burden was more than adequately met by the evidence adduced at the trial. The Appeals Court so concluded after reviewing the entire record (Pet. p. 22).

3. There is no actual conflict between the Second and Ninth Circuits on the subject of the effect of failure to police copyrights. The decision below was not predicated upon a finding of abandonment of the copyright because of petitioner's failure to prosecute other infringements, but was based upon factual evidence that satisfied both the District and the Appeals Courts that the copyright owners had authorized or acquiesced in the mass circulation for a long period of time of copies not bearing any notice. *Peter Pan Fabrics Inc.* v. *Acadia Co.*, 173 F. Supp. 292 (S. D. N. Y. 1959); *Scarves by Vera Inc.* v. *United Merchants and Mfrs., Inc.*, 173 F. Supp. 625 (S. D. N. Y. 1959); *B. & B. Auto Supply Inc.* v. *Plesser*, 133 U. S. P. Q. 247 (S. D. N. Y. 1962); *Nimmer on Copyright*, §139.2. Under the circumstances no unusual or controversial doctrine is involved.

4. Petitioner's counsel, in his over-zealous efforts to obtain a writ from this Court, has been less than fair in referring in his petition to an unfinished and unmailed letter allegedly written by petitioner's deceased husband in 1915 (Pet. p. 7 [footnote]). This instrument was refused admission into evidence by the District Court because it was not a proven ancient document, had never been completed and mailed and was self-serving (24a-27a). Counsel's reference to the rejected "letter" to support his argument seems irregular at the least. In any event, the fact that said letter was not completed and never mailed supports an inference exactly opposite to that which petitioner urges, for its non-mailing suggests that the author of the "letter" acquiesced in the very "infringements" he purportedly deplored. Consequently, the exhibit in question,

if worthy of any judicial attention, adds persuasive evidence to that relied upon by the courts below to support the determination that the copyright owner had "acquiesced" in the wide circulation of the print in suit.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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